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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 807

SIDNEY NORMAN BRILLIANT,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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UNITED STATES OF AMERICA.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on January 2, 1962.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, p. 17.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 2, 1962 (Appendix, infra, p. 31). A timely petition for rehearing was filed and this petition was overruled on January 24, 1962. On February 16, 1962, this Court granted Petitioner to and including March 25, 1962 within which to file this petition for writ of certiorari. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether in the prosecution of a federal criminal case the defendant is entitled to the Grand Jury testimony of a Government witness who has testified at the trial against the defendant.

2. Whether in the prosecution of a federal criminal case it is incumbent upon the trial court, upon a request by the defendant, to examine in camera the testimony before the Grand Jury of a witness who has appeared at the trial for the Government so as to determine whether or not the defendant should be allowed to examine the Grand Jury testimony of said witness or any portion thereof, and to further determine whether the testimony or any portion thereof could be used by the defendant in the cross-examination of the witness.

3. Whether a particularized need must be shown before it becomes incumbent on the trial court to examine in camera the Grand Jury testimony of a government witness to determine if the defense is entitled to inspection of said testimony or any portion thereof.

4. Whether the attempt to impeach the testimony of a witness constitutes a particularized need.

5. Whether a particularized need has been shown when, in a case charging the filing of a false statement, the in-

dictment alleges falsity in one respect only, and the Government elicits from its chief witness testimony which would tend to prove falsity in several other and separate respects.

6. Whether a particularized need may be shown by cross-examining a witness relative to said witness's Grand Jury testimony in an effort to show inconsistencies between said witness's Grand Jury testimony and Court-room testimony.

STATUTE INVOLVED.

United States Code, Title 18, Section 1010:

"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association or corporation, with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance or for the purpose of obtaining any extension or resume of any loans, advance of credit or mortgage insured by such administration, or the acceptance, release or substitution of any security on such a loan, advanced on credit or for the purpose of influencing, in any way, the actions of such administration, makes, passes, utters or publishes any statements knowing the same to be false or alters, forgers or counterfeits any instrument, paper or document, or utters, publishes or passes as true any instrument, paper or document, knowing it to have been altered, forged or counterfeited, or willfully overvalues any security, assets or income shall be fined not more than $5,000.00 or imprisoned not more than two years or both."

STATEMENT.

Defendant was charged with and convicted of a violation of 18 U. S. C. 1010, in that he did make or cause to be made a statement, knowing same to be false, for the pur-

pose of obtaining a loan, intending that said loan be offered to and accepted by the Federal Housing Administration for insurance.

The indictment charged that the defendant made a false statement in a credit application signed by Mr. and Mrs. White, said application stating that the proceeds of the loan would be used for property improvement, "when in truth and in fact $664.04 of the proceeds of said loan was intended to be used for other purposes to-wit, to pay off and satisfy an automobile loan then owing by the said Frank White and Bessie White, which defendant well knew." (Indictment, infra, p. 16.)

Mrs. White testified that she first met the defendant, an aluminum siding salesman, in July or August of 1959 (R. II—14) and that Mrs. White told him that they could not afford siding because of their other payments (R. II—18). She stated that defendant told Mr. and Mrs. White that he could pay off their car payments and have the car payments included in the siding payments (R. II—18).

Mrs. White stated that she signed a credit application, marked Exhibit 3 (R. II—31, 32), being the document giving rise to the instant charge (R. II—30).

As indicated above, the indictment alleges falsity in the credit application only with regard to the use of certain of the funds for the paying off of an automobile loan. The Government brought out through the testimony of Mrs. White, over the defendant's objection, however, that the credit application indicated that Mr. and Mrs. White had other income of $75.00 per month, whereas Mrs. White testified in Court they received only $40.00 a month from their son (R. II—34-35); that the application indicates income from the rent of the downstairs apartment, whereas Mrs. White testified in court that she had no conversation with the defendant concerning a downstairs apartment and that she did not in fact have a downstairs apart-

ment (R. II—35-36); that the credit application stated that the price paid for the home owned by Mr. and Mrs. White was $8500.00 whereas Mrs. White testified in court that she told the defendant she paid $7500.00 for the home (R. II—36-37).

Prior to the cross-examination of the witness, Mrs. White, the following occurred:

> Mr. London: At this time, prior to my cross-examination of the witness, I would like to request that if the government has any statement made to them, to an agent of the government, and I would also request the grand jury testimony of this witness given in this case.
>
> Mr. Newton: Well, I have the statement of the witness and I will now produce it. Of course, the government would object to the grand jury transcript because there is no showing of a necessity for that.
>
> Mr. London: In view of the government's objection I would add if the Court feels that the defendant is not entitled to the grand jury testimony, I would ask that the grand jury testimony of the witness be examined in camera by the Court to determine whether or not the defendant should be allowed to see the testimony, or any portion thereof, or whether this testimony or any portion thereof could be used by the defendant in cross-examination of this witness.
>
> The Court: I don't know of any reason that the defendant is entitled to any grand jury testimony. You say you have the statement?
>
> Mr. Newton: Yes, I do.
>
> The Court: All right, produce it.
>
> (Thereupon Mr. Newton hands the document to the Court.)
>
> Mr. Newton: In view of the witness' testimony I think that portions of that statement could be ge-

moved as having no relation with the testimony given in this case.

The Court: What parts don't apply here?

Mr. Newton: I beg your pardon?

The Court: What parts do you say don't apply?

Mr. Newton: I thought the last.

The Court: Do you mean this? (Indicating.)

Mr. Newton: Yes. That, and also about the work done. Would that be five?

The Court: This page that I just handed you was page six. It does not go to matters that the witness has testified about.

Mr. Newton: That is correct.

The Court: At this particular time.

Mr. Newton: That is the only part that I did not think would be relevant.

The Court: Mark this "C-1".

(Thereupon the document above referred to was marked by the Reporter for identification as Exhibit C-1.)

The Court: This is a statement handed to the Court by counsel for the government. The Court has read the statement and has tried to excise parts of it, they being all of page six, the last paragraph on page five, and the first two lines on page seven.

Exhibit C-1 with the part excised which the Court has referred to in camera which do not at this time relate to the witness' testimony will be supplied to the defendant at this time.

Mr. London: If the Court please, this portion which has been excised as you have just referred to, that is being made by the Court, is that correct?

The Court: Correct.

Mr. London: And I am not at this time being permitted to have those portions?

The Court: That is right. They will be put in an envelope and kept in the file (R. II—40-42).

During the cross-examination of Mrs. White, the defense attempted to question her concerning her Grand Jury appearance and the following occurred:

Q. (By Mr. London) Did you testify before a grand jury, Mrs. White?

A. What do you mean by that?

Q. Were you called as a witness before a grand jury on the fourth floor of this building?

Mr. Newton: Just a moment. I object.

A. I talked to a jury.

The Court: Just a moment.

Mr. Newton: I object to any reference as to any testimony.

The Court: Sustained. Bring your book, Miss Wood.

(Thereupon the following occurred at the Bench, out of the hearing of the Jury:)

The Court: What is the purpose of obtaining that information?

Mr. London: I want to ask this witness some further questions as to whether or not she stated the same things at that time as she has stated here today.

The Court: Well, that could only be for the purpose of calling for the grand jury testimony.

Mr. London: No, not entirely. I made my request for the grand jury testimony, of course.

The Court: Yes, sir, and you haven't got it.

Mr. London: That is correct.

The Court: All right.

Mr. London: I would also like to know whether the same things she has stated here were told to the grand jury or if there has been any divergence.

The Court: That would be calling upon this witness to pass upon her testimony given some place else.

Mr. London: I'm asking for a matter of fact.

The Court: You're asking for a conclusion. You would be asking her if there is any difference.

Mr. London: I wish to interrogate for the purpose of showing——

The Court: That wasn't gone into on direct examination. It could only be for the purpose of impeachment. You don't have the grand jury testimony and you are asking whether she made certain statements before the grand jury?

Mr. London: That is what I intend to ask her if she said——

The Court: Do you wish to make an objection as to any matter with reference to the grand jury?

Mr. Newton: Yes, I have.

The Court: The objection will be sustained.

Mr. London: Let me offer——

The Court: And you are making an offer of proof?

Mr. London: Let the record show that if this witness were permitted to answer—well, strike that. Let the record show that to make a specific offer, of course, would be extremely difficult for me. This being a government witness and I, of course, as the record indicates, not being provided with a copy of the grand jury's testimony, I would like to ask this witness whether or not she told the grand jury about the alleged false information which is contained in the credit application, marked and introduced as Government's Exhibit 3, to determine whether she did, in fact, make such statements to the grand jury, and if, in fact, the grand jury had this information in its possession in returning the indictment and whether or not this information was withheld from the grand jury.

The Court: There was no motion filed here to quash the indictment because of any misconduct of the grand jury.

Mr. London: No, sir, that is correct.

The Court: All right. Defendant is not entitled to the grand jury's testimony. This witness is not entitled to testify as to her grand jury testimony, unless it should be in a matter which involves her testimony before the grand jury. This is not a case of her testimony before the grand jury. She is not charged with perjury or anything else by the government. She is not on trial. The grand jury is following an investigation procedure and it would be ridiculous to ask this witness if the testimony here was the same as the testimony before the grand jury. It would call for nothing but the conclusion of the witness and I will not permit counsel to go into that further and for the further reason it is outside the scope of the direct examination.

Mr. London: It is for the purpose of impeaching the witness.

The Court: You can't impeach a witness by the witness' own testimony on the stand, is what I have been trying to point out to you, that is not the proper way to do it. You have to ask the witness if she made such a statement at such and such a time.

Mr. London: I understand that.

The Court: If that statement is contrary to what she has testified to—if she makes a different statement than she has here, you use that statement. You don't have the grand jury's testimony. The only thing you're trying to do is ask the witness to pass on her testimony here and some place else.

Mr. London: It is possible by asking this witness questions here I can develop impeachment if I would ask her, for example, did you tell the grand jury that you paid eighty-five hundred dollars for the house, and she would answer, "yes", her answer "no" here would be impeaching her testimony and the defendant

could point that out again for the purpose of argument.

The Court: All right. For the reasons stated, the objection has been sustained.

Mr. London: Asking that would not call for a conclusion. It is not my idea to ask for conclusions of the witness, or to ask her to pass upon her testimony, but to ask her questions as a matter of fact.

The Court: Do you wish to stand on your objection to the reference?

Mr. Newton: Yes, sir, I do.

The Court: All right, the objection is sustained. Anything further? (R. II—66-71.)

Various other witnesses testified for the government concerning the automobile loan and the payment made on said loan, as well as witnesses testifying relative to the home improvement loan issued for the work done on the White's residence.

The defense offered no evidence.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Eighth Circuit below is in direct conflict with several decisions handed down by the Second Circuit. The Eighth Circuit ruled in the instant case that the defendant has not met the burden of showing a particularized need, and that, therefore, it is not necessary for the trial court to make an in camera inspection of the witness's grand jury testimony.

The Second Circuit, however, has ruled that it is incumbent upon the trial judge to make such inspection upon request without the necessity of any previous showing. **United States v. Hernandez**, 290 F. 2d 86; **United States v. Hernandez**, 282 F. 2d 71.

The Second Circuit has also ruled in **United States v. Zborowski**, 271 F. 2d 661, that the judge should examine the transcript when an inconsistency has been pointed out, and that the Court should similarly examine even if there has been no inconsistency illustrated, if the witness is the only direct evidence against the defendant. In the instant case Mrs. White's testimony was the only direct evidence relative to the alleged false information.

The conflict is similarly illustrated by a comparison of the decision of the Eighth Circuit in the instant case with **United States v. Giampa**, 290 F. 2d 83; **United States v. Santore**, 290 F. 2d 51; **United States v. McKeever**, 271 F. 2d 669; **United States v. Spangelet**, 258 F. 2d 338.

The conflict, however, is not limited to the Second and Eighth Circuits. The Eighth Circuit has now joined with the Ninth Circuit (**Herzog v. United States**, 226 F. 2d 561), the Fifth Circuit (**Parr v. United States**, 265 F. 2d 894) and the Tenth Circuit (**Travis v. United States**, 269 F. 2d 928, cert. granted 363 U. S. 80, reversed on other grounds, 364 U. S. 631) in not accepting the doctrine as set forth by the Second Circuit.

It goes without saying that petitioner considers the Second Circuit view to be the proper and most progressive attitude on this point. It also goes without saying, however, that the state of the law on this point is presently an unknown factor. Until this Court makes a specific determination as to the issues presented herein the rulings and opinions by the District and Appellate Courts of the country will be in hopeless conflict as illustrated by the conflict presently existing among the five Circuits that have considered the point.

A directive by this Court is needed to determine whether a trial court is required to examine the Grand Jury testimony of a witness and furnish it to the defendant. At

present it is impossible to determine whether it is incumbent upon the trial court to examine the testimony upon request or whether a particularized need must first be shown, and if such need must be shown what formula is to be followed in deciding if the need exists and has been shown.

2. This Court has previously given consideration to the question of the inspection of Grand Jury testimony by the trial court. This Court held in **United States v. Procter & Gamble**, 356 U. S. 677 at page 683: "We do not reach in this case problems concerning the use of the Grand Jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility, and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly."

This Court also considered the problem in **Pittsburgh Plate Glass Company v. United States**, 360 U. S. 395, holding that there was no absolute right to inspect Grand Jury testimony and that a particularized need should be pointed out as had been held in the **Procter and Gamble** case. This Court would not rule upon the question of an in camera inspection by the lower Court in view of the fact that said request had not been made during the trial. The request for in camera inspection at the trial level was made in the instant case. This Court stated in the **Pittsburgh Plate Glass Co.** case at page 401, "Be that as it may, resolution of that question must await a case where the issue is presented by the record."

It now becomes necessary for this Court to instruct the lawyers and the lower Courts as to the rights of defendants concerning Grand Jury testimony. The necessity for secrecy in Grand Jury proceedings is not here disputed, and yet it must be recognized that after a witness has testified in open Court, the need for the secrecy of what this witness said before the Grand Jury concerning the

matters testified to in Court has little, if anything, to support it. Fairness as well as justice requires at least an inspection of the Grand Jury transcript by the trial Court to determine whether or not the defendant would be assisted in his defense by the use of such transcript or portions thereof.

3. As indicated above, this Court has recognized impeachment and the testing of credibility as particularized needs which warrant the lifting of the secrecy of Grand Jury proceedings. **United States v. Procter & Gamble**, supra. The Eighth Circuit, however, did not consider such matters in the instant case as sufficient need to warrant an in camera inspection.

If a particularized need must be shown prior to an in camera inspection of the Grand Jury testimony it is necessary for this Court to advise the lower Courts as to what constitutes this need and how this need may be shown.

As indicated in the statement of the case the indictment in this case charges falsity in one regard only (Appendix, infra, p. 16), whereas the chief prosecution witness testified as to false information in the credit application in several instances, and yet the Eighth Circuit ruled that there was no particularized need shown.

The Eighth Circuit based its decision in this case primarily on the recent case of **Berry v. United States**, 295 F. 2d 192, cert. den. . . . U. S. . . . ; 7 L. Ed. 2d 388, 82 S. Ct. 298. The **Berry** case involved a violation of 18 U. S. C. 2421, being the interstate transportation of a female for immoral purposes. The issues in that case as pointed out by the Eighth Circuit involved only the transportation and the immoral purposes. The Court there stated that the transportation having been admitted by the defense "Obviously no indictment would have been returned unless she had testified before the Grand Jury that she had had immoral sexual relations with Berry." 295 F. 2d 196.

In the instant case, however, the witness testified as to several items of false information, whereas the indictment specified only one. It cannot therefore be arbitrarily assumed that her testimony before the Grand Jury was the same as her testimony in Court, in view of the fact that the indictment had not set forth the other items of false information to which the witness had testified in Court. This inconsistency has been pointed out to the trial Court and also on appeal but the Eighth Circuit has still ruled that no particularized need has been shown.

The opinion by the Eighth Circuit in this case as compared with the decisions by this Court, referred to above, presents a clear conflict concerning the definition of and necessity for a particularized need. The issue thus presented is important and should be considered by this Court so as to eliminate the confusion which now exists.

4. The defense in the instant case attempted to examine the chief government witness concerning her Grand Jury testimony to point out specifically inconsistencies in said testimony and her court room testimony. The objection of the Government, however, was sustained.

Petitioner contends that the testimony was in conflict with the indictment and if, in fact, a particularized need is necessary it is thereby shown. If, however, further steps to show this need are necessary, then petitioner was denied the opportunity of so demonstrating his need for the production or in camera inspection of the Grand Jury testimony. The present state of the law in this area has resulted in a situation in which the Court at the trial level ruled that a need had not been shown and similarly ruled that a need could not be shown by cross-examination.

This case is by no means unique with regard to the necessity or the request for the production of the Grand Jury testimony. It is a problem that arises in most crim-

inal cases and this Court should, therefore, hand down its ruling as to whether or not a particularized need is necessary to require the trial Court to conduct an in camera inspection, and if such need be necessary then this Court should advise the lower Courts concerning how this need may be shown.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Indictment.

(Filed Oct. 11, 1960, Harold G. Pryce, Clerk.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,
v.
Sidney Norman Brilliant,
Defendant.
No. 60CR221(3).

The Grand Jury charges:

That on or about August 20, 1959, at St. Louis, Missouri, within the Eastern Division of the Eastern District of Missouri,

Sidney Norman Brilliant

did make, pass, utter and publish and cause to be made, passed, uttered and published a statement to First Bancredit Corporation, knowing same to be false, for the purpose of obtaining a loan and advance of credit from said First Bancredit Corporation with the intent that such loan be offered to and accepted by Federal Housing Administration for insurance and for the purpose of influencing the action of said Federal Housing Administration. The said false statement was contained in a certain credit application for property improvement loan made and signed by Frank White and Bessie White on which said application it is stated that the proceeds of the loan applied for, $2,180.00, would be used for the improvement of property located at 327 Jefferson, Valley Park, Missouri, when in truth and in fact $664.04 of the proceeds

of said loan was intended to be used for other purposes, to wit, to pay off and satisfy an automobile loan then owing by the said Frank White and Bessie White, which defendant well knew.

In violation of Section 1010, Title 18, United States Code.

A True Bill.

Robt. M. Wolpers,
Foreman.

William H. Webster,
United States Attorney.

Opinion.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 16,806

Sidney Norman Brilliant, Appellant.
vs.
United States of America, Appellee.
} Appeal from the United States District Court for the Eastern District of Missouri.

[January 2, 1962.]

Before SANBORN and VAN OOSTERHOUT, Circuit Judges, and GRAVEN, Senior District Judge.

GRAVEN, Senior District Judge.

The appellant appeals from a judgment of conviction and sentence imposed upon him following a trial and ver

dict of guilty by a jury under an indictment in one count. The appellant was sentenced to fifteen-months' imprisonment and to pay a fine of $500. On October 11, 1960, a Grand Jury for the Eastern District of Missouri returned the following indictment:

"The Grand Jury charges:

"That on or about August 20, 1959, at St. Louis, Missouri, within the Eastern Division of the Eastern District of Missouri,

"SIDNEY NORMAN BRILLIANT

did make, pass, utter and publish and cause to be made, passed, uttered and published a statement to First Bancredit Corporation, knowing same to be false, for the purpose of obtaining a loan and advance of credit from said First Bancredit Corporation with the intent that such loan be offered to and accepted by Federal Housing Administration for insurance and for the purpose of influencing the action of said Federal Housing Administration. The said false statement was contained in a certain credit application for property improvement loan made and signed by Frank White and Bessie White on which said application it is stated that the proceeds of the loan applied for, $2180.00, would be used for the improvement of property located at 327 Jefferson, Valley Park, Missouri, when in truth and in fact $664.04 of the proceeds of said loan was intended to be used for other purposes, to wit, to pay off and satisfy an automobile loan then owing by the said Frank White and Bessie White, which defendant well knew.

"In violation of Section 1010, Title 18, United States Code."

Section 1010, Title 18, United States Code, provides in part, as follows:

"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance * * * or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both."

The appellant, hereafter referred to as the defendant, raises and argues three points in his appeal. His first point is that the trial court erred in refusing to furnish the defendant with a transcript of the grand jury testimony of Mrs. Bessie White, a government witness, and in refusing to examine that testimony in camera in order to determine whether such transcript should be furnished to the defense for use in cross-examination of Mrs. White. His second point is that the trial court erred in restricting defendant's cross-examination of Mrs. White as to her testimony before the grand jury. His third point is that the trial court erred in failing to sustain the defendant's motion for judgment of acquittal.

The defendant did not offer any testimony at the trial. From the testimony offered by the government, it appears that during the year of 1959 the J. & L. Construction Company was engaged in the making of home improvements in the City of St. Louis. During that year it employed three salesmen. It also made use of a number of canvassers. These canvassers would go from door to door trying to ascertain if home owners would be interested in making improvements. If a home owner manifested interest in making home improvements the canvasser would arrange for an appointment with a salesman for the J. & L. Construction Company. During the year of 1959

the defendant was in the employ of that company as a salesman and one Gary Dardick was a canvasser for that company. In 1959 Frank White and his wife, Bessie White, resided in St. Louis. Mrs. White had a seventh grade education. Frank White could sign his name but otherwise could not write. He could not read. In 1957 the Whites had purchased a home for the sum of $7,500 for which they were paying at the rate of $75 a month. Prior to July, 1959, they had purchased an automobile for which they were paying at the rate of $69.80 a month. Mr. White was employed by a plumbing company as a plumber-laborer. He was paid $3.05 an hour and worked a forty-hour week. He worked very little overtime.

In the latter part of July and the first part of August, 1959, the defendant called on the Whites three times at their home. The first two times he was alone. The third time he was accompanied by a man referred to by him as "Dad". The first time the defendant called on the Whites he informed them that he was selling aluminum siding. He discussed with them the matter of improvements to their home. He told them that he would put aluminum siding on their home and put in a picture window and door for a total of $1400. The Whites informed him that they were making payments of $75 a month on their home and $69.80 a month on their automobile and could not afford the proposed improvements. The Whites informed him that they owed $698 on the automobile loan. At this point, the defendant informed them that he could arrange it so that the unpaid balance on the automobile loan could be added to the amount of a loan for the home improvements and that the monthly payments on the combined amount would only be about a dollar a month more than their payments on their automobile loan. As a result of the defendant's efforts, the Whites signed several documents. They signed a contract with the J. & L. Construction Company dated August 6, 1959, under which the lat-

ter was to furnish all materials and labor necessary for the proposed improvements in return for the sum of $2,180 payable in 36 monthly payments of $70.08 each. They signed a credit application dated August 6, 1959, for a loan of $2,180. It appears that they also signed a promissory note for $2,180.

The automobile loan of the Whites was held by Mutual Bank and Trust Company of St. Louis. In connection with that loan the Whites were given a coupon book with a coupon for each payment. This was referred to as their car payment book. On the second visit of the defendant, the Whites produced their car payment book. The defendant took it stating that he would pay off the loan. On the third visit of the defendant he gave them the car payment book which bore a "paid" stamp on it. Mrs. White testified that they signed the credit application on the third visit. The other documents were signed by them on either the second or third visit. The Whites did not prepare any of the documents signed by them. They were presented to them for their signature by the defendant in prepared form. The credit application signed by the Whites was entitled, "CREDIT APPLICATION FOR PROPERTY IMPROVEMENT LOAN" followed by the statement, "This application is submitted to obtain credit under the terms of Title I of the National Housing Act." Below the latter appears the following: "To FIRST BANCREDIT CORPORATION." The application gave the legal description of the residence property of the Whites and furtner stated: "PROCEEDS OF THIS LOAN WILL BE USED TO IMPROVE THE ABOVE DESCRIBED PROPERTY AS FOLLOWS." The following were listed as the contemplated improvements: aluminum siding, new window and door. Near the bottom of the application the following appears:

"WARNING

Any person who knowingly makes a false statement or a misrepresentation in this application shall be subject to a fine of not more than $5,000 or by imprisonment for not more than 2 years, or both, under provisions of the United States Criminal Code."

In the credit application, the purchase price of the White residence was given as $8,500. The purchase price was $7,500 and the defendant had been so informed by the Whites.

Prior to the execution of the credit application, the Whites informed the defendant as to Mr. White's earnings. In the application it was stated that the Whites had a present salary or net income from business of $550 a month. In the application it was stated that they had other income of $175 a month and that the source of that income was the rent of a downstairs apartment. The Whites did not have any downstairs apartment. They did not state to the defendant that they had such other income. At the bottom of the application appears the following: "I (we) certify that I (we) am (are) the person(s) who sold this job. Name /s/ Gary Dardick." Gary Dardick testified that the signature was not his signature and that he had not met the Whites. The papers signed by the Whites were delivered by them to the defendant and he left their home with them. The papers were received by the St. Louis branch of the First Bancredit Corporation sometime prior to August 20, 1959. On August 20, 1959 it issued its check to the J. & L. Construction Company in the amount of $2,180, which check was endorsed by that company and paid by the bank on which it was drawn.

Arthur Talarico, office manager and credit manager of the St. Louis branch of the First Bancredit Corporation,

testified that during the year 1959 the J. & L. Construction Company was one of the dealers who handled home improvement financing through First Bancredit Corporation. He testified that in 1959 all of the home improvement loans financed by that lending agency for the J. & L. Construction Company were financed "only on F. H. A." He testified that when home improvement loan papers come in he examines them to see if they are acceptable for insurance under Federal Housing Administration regulations before issuing a check to the dealer. Mr. Talarico did not testify directly that this particular home improvement loan was in fact tendered to the Federal Housing Administration and accepted by it for insurance.

On cross-examination of Mr. Talarico, inquiry was made as to the date of August 6, 1959, appearing on the construction contract and the credit application. He answered:

> "May I explain the August 6th? On August 6th or within seven days of August 20th, the application was phoned in to us, at which time we gave our credit approval and under F.H.A. regulations they have to wait seven days before they can be paid for the work that has been done."

On August 17, 1959, the Mutual Bank and Trust Company, the holder of the automobile loan of the Whites, was paid the amount of the balance on that loan which was in the sum of $688. The car payment book used by the Whites bears a stamp mark, "Paid Aug 17 1959 Mutual Bank and Trust Co."

The defendant's motion for a judgment of acquittal was based on several grounds. He contends that there was no evidence presented to show that the application was in fact submitted to the Federal Housing Administration or accepted by it. The indictment follows the

language of Section 1010, Title 18, United States Code. The indictment does not charge nor does Section 1010 require that it be charged in an indictment under that Section that the loan in connection with which the false statement is made be submitted to the Federal Housing Administration or accepted by it. The charge against the defendant was that he passed, uttered, and published a statement which he knew to be false with the intent that the loan to which it related be offered to and accepted by the Federal Housing Administration. The question is not whether the loan in question was in fact offered to and accepted by the Federal Housing Administration but whether at the time he passed, uttered, or published the false statement he did so with *the intent* that it be offered to and accepted by the Federal Housing Administration. *Haakinson v. United States* (8th Cir. 1956), 238 F.2d 775, 780. See also *Cohen v. United States* (6th Cir. 1949), 178 F.2d 588, 591, *certiorari denied* (1950), 339 U.S. 920. The government was not required to prove that the loan in question was in fact offered to and accepted for insurance by the Federal Housing Administration.

The defendant contends that the evidence is insufficient to sustain a finding of the jury that he knowingly made or caused to be made the false statement charged. He is charged with having made or caused to be made the statement in the credit application that the proceeds of the proposed loan would be used to pay for the home improvements listed in the application when in truth and in fact it was intended that part of the proceeds of the loan would be used to pay the automobile loan. The credit application containing the false statement was presented by the defendant to the Whites in a prepared form for their signatures. The defendant had earlier informed the Whites that he would arrange to take care of the automobile loan out of the proceeds of the home improvement loan. The evidence is sufficient to sustain a finding by

the jury that the defendant either made or caused the false statement to be made.

It is the contention of the defendant that the evidence is insufficient to justify a finding by the jury that he passed, uttered, and published the credit application containing the false statement or caused the same to be passed, uttered, and published. The defendant took the credit application with him after it had been signed by the Whites. The application then appears in the hands of the First Bancredit Corporation to whom it was addressed. The evidence was sufficient to sustain a finding by the jury that he either passed, uttered, or published the credit application containing the false statement or caused it to be passed, uttered, and published.

It is the contention of the defendant that the evidence is insufficient to sustain a finding of the jury that he made, passed, uttered, and published the false statement with the intent that it be offered to and accepted by the Federal Housing Administration for insurance and for the purpose of influencing the action of that Administration. In regard to this matter, Mr. Talarico testified that during the year of 1959 all loans handled by the First Bancredit Corporation for the J. & L. Construction Company were "only on F. H. A." The credit application on its face prominently stated that it was submitted to obtain credit under Title I of the National Housing Act. It contained a warning that the making of a false statement or misrepresentation constituted a federal crime. The defendant was a salesman for the J. & L. Construction Company selling home improvements which were being financed through Federal Housing Administration loans. Under Title I of the National Housing Act, Section 1703, Title 12, United States Code, insurance against loss is provided to qualified financial institutions only for loans made for improvements to real property. Automobile

loans are not eligible for such insurance. The overstating in the credit application of the agreed cost of the home improvements by the approximate amount of the automobile loan for the apparent purpose of concealing the fact that if was intended that the proceeds of the proposed home improvement loan would be used to pay the automobile loan is of evidentiary significance.

In the case of *Ross* v. *United States* (6th Cir. 1950), 180 F.2d 160, the defendants had been convicted under Section 1731(a), Title 12, United States Code. That Section is substantially similar to Section 1010, Title 18, United States Code. The Court in that case stated (pp. 164-165):

> "The insistence of appellants that they should have had a verdict directed in their favor is not well grounded. They urge that there was no proof that the applications were made with the intent that the loans should be offered to the Federal Housing Administration. As in the *Cohen* case [178 F.2d 588], appellants furnished the signers of the documents FHA forms upon which was prominently displayed, on the top line: 'FHA Title I Credit Application'. As stated in the opinion in that case, the jury was privileged to infer existence of intent that loans should be sought from the Federal Housing administration, and that the particular applications and notes were used to influence the action of that governmental agency. This being true, there was no error in the refusal of the district judge to charge, as requested by appellants, that in order to convict, it must be found that appellants had 'actual knowledge that said credit application would be offered by the Universal C. I. T. Credit Corporation to or accepted by the Federal Housing Administration for insurance and that the action of said Federal Housing Administration would be influenced thereby'; * * *"

In the present case the evidence is sufficient to sustain a finding by the jury that the defendant passed, uttered, and published the credit application containing the false statement or caused it to be passed, uttered, or published with the intent that it be offered to and accepted by the Federal Housing Administration and for the purpose of influencing the action of that Administration.

The defendant urges two other grounds in connection with his motion for judgment of acquittal. While he refers to those grounds as being related to insufficiency of the evidence, it appears that in essence what he urges are claimed variations between the allegations in the indictment and the proof. A variance between the allegations of an indictment and the proof are not prejudicial unless the defendant was misled at the trial or unless the variance was capable of depriving him of protection against another prosecution for the same offense. *Haakinson* v. *United States* (8th Cir. 1956), 238 F. 2d 775, 781.

The defendant urges that while the indictment alleges that the amount of the automobile loan in question was $664.04 the proof was that the amount of the loan was $688. That variation was trivial and could not possibly have prejudiced the defendant.

The defendant also urges that the indictment states that the falsity was the intent to use part of the home improvement loan to pay off an automobile loan *then owing* while the testimony of Mrs. White was that the credit application containing the false statement was made out during the defendant's third visit, at which time the car payment book was returned already marked "paid." The defendant argues that such being the situation there was no automobile loan "then owing" and hence the possibility of falsity as charged in the indictment was nonexistent. The Mutual Bank and Trust Company was paid the amount of the automobile loan on August 17, 1959. On

August 20, 1959, the J. & L. Construction Company received from the First Banecredit Corporation the proceeds of the improvement loan in the amount of $2,180. That amount was $780 in excess of the agreed cost of the home improvements to be made by the J. & L. Construction Company. It is, therefore, apparent that the J. & L. Construction Company was reimbursed for the amount that had been paid to the Mutual Bank and Trust Company on the automobile loan. The fact that on August 20, 1959, the J. & L. Construction Company was reimbursed in that amount would negative the claim that the automobile loan was not "owing" on August 17, 1959, at the time the credit application was signed by the Whites. As heretofore noted, Mr. Talarico of the First Banecredit Corporation testified that within seven days of August 20, 1959, the application had been telephoned to that corporation and credit approval given. The jury could well have found that the situation was that the J. & L. Construction Company had secured credit approval of the loan prior to August 17, 1959, by telephone and thereupon it advanced the money to take care of the automobile loan under its arrangements with the Whites and that thereafter and until the J. & L. Construction Company was reimbursed for advancing the amount necessary to take care of the automobile loan the automobile loan was owing to that company by the Whites. There is nothing in the record which would tend to indicate that either the J. & L. Construction Company or the defendant intended to make the Whites a gift in the amount of the automobile loan. The evidence was sufficient to sustain a finding by the jury that at the material time in question the automobile loan was "then owing" by the Whites. The motion of the defendant for judgment of acquittal was properly overruled by the District Court.

The other claimed errors on the part of the District Court have to do with the matter of grand jury minutes.

At the end of the direct examination of Mrs. White and prior to cross-examination, the defendant requested that he be given any statement made by the witness to the government and the grand jury testimony of the witness. The defendant was then furnished with a written statement several pages in length given by Mrs. White to a Special Agent of the Federal Bureau of Investigation on March 23, 1960. The government's objection to the production of a transcript of the grand jury witness was sustained. The defendant thereupon requested the trial judge to examine the grand jury testimony of the witness in camera to determine whether the defendant should be allowed to see and use that testimony in connection with the cross-examination of the witness. That request was refused.

The defendant conducted a long cross-examination of the witness in which extensive use was made of the statement she had given to the Special Agent of the Federal Bureau of Investigation. No serious contradictions between the testimony of the witness and the statement were developed. Near the end of the cross-examination of the witness, the defendant sought to examine her as to whether she had testified before a grand jury and whether there was any divergence between her testimony at the trial and her testimony before the grand jury. The government objected to such examination. The defendant then stated that he wished the grand jury testimony to ascertain whether the witness had informed the grand jury as to alleged false information contained in the credit application. The objection of the government was sustained.

In the recent case of *Berra v. United States* (Oct. 27, 1961), 295 F. 2d 192, in a somewhat similar situation, this Court held that the trial judge did not abuse its discretion in refusing to examine the grand jury testimony of a witness for possible inconsistencies. In the opinion in

that case Judge Sanborn discussed the present state of the law as to grand jury minutes. No useful purpose would be served by again discussing matters so well covered by Judge Sanborn. In the present case there was no abuse of discretion on the part of the trial court in refusing to make the grand jury testimony of the witness Mrs. White available for the defendant or in refusing to examine a transcript of her grand jury testimony for possible inconsistencies. The defendant had the benefit of the long and detailed statement made by Mrs. White to a Special Agent for the Federal Bureau of Investigation on March 23, 1960, which differs in no material respect from her testimony at the trial. It would seem unlikely that Mrs. White's testimony which returned the indictment varied in any material respect from the testimony she had given at the trial. We do not believe that the defendant met the burden of showing a "particularized need" for the grand jury testimony of Mrs. White or that he suffered any prejudice as a result of such testimony not being made available.

The defendant in the present case was found guilty following a fair and impartial trial in which no error was committed. The judgment of conviction and sentence is affirmed.

Judgment.

(Filed Jan. 2, 1962. Robert C. Tucker, Clerk.)

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 16,806. September Term, 1961.

Sidney Norman Brilliant,
Appellant,

v.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Sidney Norman Brilliant, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days after the date of filing of the Mandate of this Court in the District Court.

January 2, 1961.

Approved for the Court:

Robert C. Tucker,
Clerk, U. S. Court of Appeals,
Eighth Circuit.

Opinion on Rehearing.

(Filed Jan. 24, 1962. Robert C. Tucker, Clerk.)

United States Court of Appeals
for the Eighth Circuit.

No. 16,806. September Term, 1961.

Sidney Norman Brilliant, Appellant, v. United States of America.	Appeal From the United States District Court for the Eastern District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

January 24, 1962.

Approved for the Court:

Robert C. Tucker,
Clerk, U. S. Court of Appeals,
Eighth Circuit.